United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1253

76-1258

To be argued by
MILTON S. GOULD

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

FRED STEINBERG and DENNIS RIESE,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT DENNIS RIESE

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Preliminary Statement

The seven-count indictment charged defendants Steinberg and Riese with conspiracy to violate, and with a violation of Section 201(b) of Title 18 of the United States Code. Trial was had before Hon. Inzer B. Wyatt, U.S.D.J. and a jury. On April 1, 1976, after nine days

of trial and after approximately 3 1/2 hours of deliberation, the jury returned a verdict of guilty on all counts against both defendants. On May 21, 1976, judgment of conviction was entered against appellant Riese; the Court, finding that Riese had not yet attained his 26th birthday at the time of conviction, found him suitable for handling under Section 5005 of Title 18 U.S. Code, the Federal Youth Correction Act. Riese was sentenced as a Young Adult offender pursuant to Section 5010(a) of Title 18 U. S. Code. The imposition of the sentence was suspended on each of counts one through seven and Riese was placed on probation for a period of three years subject to the standing probation order of the Court below.

Mr. Riese now appeals from said judgment of conviction and sentence.

Issues Presented for Review

1. May a bribery conviction stand, as a matter of due process of law, where the undisputed evidence shows that the defendant, a 24-year old boy with no previous criminal record, repeatedly refused requests by the government agents for money, and succumbed only after the agents threatened to destroy the defendant's business while simultaneously insisting that what they asked was legal?

2. May a bribery accusation, in the circumstances set forth in Question "1", survive a challenge under the defense of entrapment?

3. May a bribery conviction stand, where it is the product of inflammatory argument by the prosecutor and inflammatory evidence sought to be introduced by him concerning an issue ruled by the Court to be "totally irrelevant", i.e., the issue whether the defendant's employer hired "illegal" alien help because such aliens were not union members and were a source of "cheap labor"?

Summary of the Indictment

The indictment charges defendant Dennis Riese with conspiracy (Count 1) and violation of the bribery statute, 18 U.S.C. §201(b) (Counts 2 through 7). The charges against Mr. Riese, as outlined in the indictment, related to a bribery of two criminal investigators of the Immigration and Naturalization Service, John Volpe and Joel Moskowitz. Specifically, the indictment alleges that defendants Riese and Steinberg, along with others, conspired to or actually did, in fact, bribe John Volpe and Joel Moskowitz with the intent to influence their official acts and to induce them "to do or omit to do acts in violation of their lawful duties." Count 2 of the indictment alleges that Dennis Riese and Fred Steinberg offered meals to John Volpe and Joel Moskowitz. Counts 3 through 7 allege that Dennis Riese and Fred Steinberg aided and abetted aliens who each gave bribes of $1,000 to John Volpe or Joel Moskowitz.

The Evidence

Events Leading Up To Governmental Tape Recordings of Defendant

The Government's evidence disclosed that Mr. Steinberg initially met John Volpe on March 19, 1975 during the course of an "investigation" at a Brew Burger restaurant located at 59th Street and Third Avenue (Tr. 90)*. John Volpe and other immigration officers were in the process of arresting various aliens working in the store. Three-quarters of the way through this investigation, Fred Steinberg entered the restaurant and introduced himself to John Volpe as the night supervisor. Steinberg initially asked John Volpe if he could leave the aliens in the store at that time and possibly come back for them later, after the store closed. He further asked Volpe if they could "work something out."** John Volpe further testified that Fred Steinberg told him that they had the Lindsay

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* All references followed by an "a" refer to pages in the appendix. References to the Trial Transcripts will be preceded by "Tr." and references to exhibits not included in the appendix shall be preceded by "Gvt. Ex." or "deft. Riese Ex." etc.

** Evidence adduced at the trial revealed that Fred Steinberg was not the first businessman to ask Immigration officers

administration "bought" and the police "taken care of."

When John Volpe went back to his office, he immediately reported the incident to his supervisor, John Coffee. The following day, Volpe and Coffee spoke to James Roland, another supervisor, about the incident on the prior evening. Volpe, Coffee and Roland then went in to see Francis Johnson, the Chief Investigator of the Immigration and Naturalization Service. [Joel Moskowitz was present during this conference (Tr. 104, 105).] Johnson instructed Volpe to investigate the matter further. No memorandum of the incident, or of the meeting which followed, was made.

On March 31, 197[illegible], John Volpe, this time accompanied by Joel Moskowitz, conducted another investigaton at a Brew Burger restaurant, this time located at 34th Street and Seventh Avenue. During the course of this investigation, Fred Steinberg again ran into the store, introduced himself as the night manager, and again, asked John Volpe and Joel Moskowitz if they could work something

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to work something out (42a, Tr. 532-3). In other cases, however, no investigations into bribery were launched, mainly because the businesses were not large chains like Brew Burger (Tr. 533). The testimony of Eamonn Dolan further revealed that the reference to working something out related specifically to a request to allow management time to replace workers in sensitive positions (29a, 30a). This is also corroborated by Volpe (41a, 42a).

out. Steinberg again said that "the Lindsay Administration was bought and that the police department was taken care of." When Steinberg mentioned something about the Lindsay administration being bought, Joel Moskowitz threatened to arrest him. Steinberg then mentioned something about his being afraid of Immigration arresting his girlfriend, because she was in this country illegally from Thailand. As an accommodation, John Volpe voluntarily signed a business card -- "the pass" -- for Mr. Steinberg to give to his girlfriend (Government Exhibit 38).

Upon returning to his office that evening, John Volpe, in the presence of Joel Moskowitz, reported to his supervisor, John Coffee. Volpe informed Mr. Coffee that he gave a pass to Fred Steinberg.* Volpe, Moskowitz and Coffee then had a conference with Mr. Roland, who informed them that they would have to speak to the Assistant Director of Investigations, Mr. Wagner.

On April 9, 1975, John Volpe prepared a memorandum at the request of his supervisor (defendant Riese's Exhibit A, 396a). Although, at that time there had been no offer or discussion of any bribe, Volpe's supervisor specifically instructed him to include, in the caption of the memorandum, "attempting to gain immigration benefits by offering a bribe

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* The pass, however, is not mentioned in a memorandum prepared for the Immigration and Naturalization Service (396a) nor is it mentioned in a memorandum prepared by the F.B.I. (Def't. Riese's Exhibit B).

to a service officer" (50a, 51a). At some time in the middle of April, Mr. Wagner suggested that the matter be reported to the F.B.I., notwithstanding the fact that there had been no attempt up to this time to bribe any agent (40a, 41a, 42a). Soon after that meeting, Mr. Roland called the F.B.I., which led to Messrs. Volpe's and Moskowitz's subsequent meeting with special agent McCormick.

On April 29, 1975, John Volpe and Joel Moskowitz, along with other investigators of the Immigration and Naturalization Service conducted an investigation at a Brew Burger located at 109 East 42nd Street. During the course of this investigation, the manager contacted Fred Steinberg by telephone, who, in turn, had a brief conversation with John Volpe. Steinberg asked Mr. Volpe if he would refrain from conducting an investigation at any of the other Brew Burger restaurants that evening. They then discussed meeting at some future date.

At a time subsequent to the April 29th meeting, John Volpe and Joel Moskowitz had a series of meetings with the F.B.I. and Assistant United States Attorney, Joseph Jaffe. They were instructed by the F.B.I. on the operation of a body recorder to be worn by both

Volpe and Moskowitz. They also signed various authorization forms which, in effect, gave permission to the F.B.I. to record their conversations. They were instructed by A.U.S.A. Joseph Jaffe as to how they should conduct the investigation and to "jump on the bandwagon" if either Dennis Riese or Fred Steinberg mentioned "green cards" (60a). A "green card," Immigration Form I-151, is issued to every alien lawfully admitted to the United States for permanent residence (8 C.F.R. §101.5).

Dennis Riese was not a party to any of the conversations among Fred Steinberg, Joel Moskowitz and John Volpe held between the period beginning March 19, and ending prior to May 6, 1975. There was no evidence that he was even aware of such conversations.

Instructions From Jaffe And
F.B.I. - Meeting of May 6, 1975

Up to the May 6, 1975 meeting, there were no offers of a bribe from Fred Steinberg or Dennis Riese--or for that matter, any other person connected with The Brew Burger restaurant chain--to John Volpe or Joel Moskowitz (56a, 58a, 64a, 67a). Additionally, no evidence of any kind was offered which would support any inference that Dennis Riese, on May 6, 1975, may have been, in any way, engaged in any conduct, criminal or otherwise, which would warrant visits by two criminal investigators of the Immigration and Naturalization Service equipped with tape recording devices and various

transmitters secreted on their bodies.

During this first taped meeting, John Volpe and Joel Moskowitz used various techniques to entice Dennis Riese and Fred Steinberg into some illicit scheme. The tactics used by Volpe and Moskowitz included various illegal overtures, numerous lies, varying degrees of pressure, and threats either explicit or implicit, combined with assurances that what they were urging was legal. The agents' purpose was to make a strong display of power which would force Dennis Riese and Fred Steinberg to agree to be participants in Volpe's and Moskowitz' plan. During cross-examination by Mrs. Barlow, Volpe said:

> Q You wanted Mr. Steinberg to understand that you had power, didn't you?
>
> A Yes, ma'am.
>
> Q You wanted to make sure he knew you had power?
>
> A Yes, ma'am (37a)*

Although there was no offer of a bribe up to the May 6th meeting, Volpe, upon sitting down with Fred Steinberg, indicated:

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* Quotations in this brief from the trial transcript are usually preceded by "Q" or "A". Quotations from the transcripts of the various taped conversations between defendants and immigration officers are usually preceded by "JM", "JV", "DR", "FS", etc.

FS You know you really blitzed me there for a while.

JV Yeah. Well that's what we are here to talk to you about. See if we can slow that down somehow, you know. (267a)

This initial overture was followed by some pressure on the part of John Volpe. He indicated to Fred Steinberg that there were still many people working for Brew Burger that could be arrested (268a). After Dennis Riese sat down at the table, John Volpe continued to apply pressure even though Riese expressly stated that he did not desire to break any laws (269a):

JV Yeah, that's it, so, so listen, you know we were blitzing, ya know, now I'm running the show at night so . . .

FS You are running the show?

JV Yeah, see now we can, ah we can cool everything down completely, and you can keep whatever you want coming, you know, like . .

DR Oh, I want, I wanna, I want to get them out of there, out of the stores, I, uh, I -- I don't want them around. I don't want to be breaking any laws.

JM They're good workers.

DR They're great workers.

JV That's it, ya know, you are gonna have a difficult time getting the people to answer your ads. (Emphasis added.)

During the entire conversation, John Volpe repeated over

and over that he was there to see "if we can work something out."

The first mention of money was in a statement made by John Volpe (290a):

> JM You hit two or three chain stores at the same time more or less the heat gets over to them, that's why Tad's, you know, Childs, We never even thought about.
>
> JV But nobody before. Everybody else talk to them and they say, "Hey, I don't know what to do, you know, you're taking my help, you're taking my help." He was smart enough to say, "Hey, listen, let's try and put something together here." So I thought about it and we were talking about it, listen it never hurts, he's got, er, we are not the first or the last guys to work something out with somebody, you know, so it's a $300,000 investment for him and me.

It was soon after this statement regarding money that Dennis Riese made an innocent request with respect to Volpe and Moskowitz helping him get a green card for one of the managers. Volpe and Moskowitz, obviously remembering the instruction from Assistant United States Attorney Jaffe that they should "jump on the bandwagon" if a green card were mentioned, began to press the issue with respect to getting a green card for one of the aliens.

Some time after the implied threat that there would be continued "blitzing" by the agents unless something were "worked out," Dennis Riese suggested that John Volpe and Joel Moskowitz should have dinner on them a couple of times

(294a). He also said he could get them basketball or hockey tickets if they were interested, indicating that he gives them out to all of his friends (294a).

With the topic of conversation on the green card, John Volpe, seizing on the opportunity, indicated that getting a green card would not be easy (296a).

Although it had not been offered by either defendant, the agents insisted on the payment of money (317a):

> JV Like you were saying, with your car, you park it anywhere, you know, you got the PD on your side, right? You talked about Lindsay and all that's fine. I don't even want to know about it, that's your gig, but a, ya know, if we can work things out where it is in a monetary situation, we don't have to worry no more. I don't think you know the guy who owns this place, he loses a little asset here, it's not gonna, it's not going to kill his pocketbook, help ours, not kill his.
>
> * * *
>
> JV You know, in a monetary situation there is no problem. You can, you can, we can see you there somewhere in a place when we come and talk to you, so you talk to me, shake my hand, and it is all done. You take who you want and that's it, so that's it. (Emphasis added.)

Once Dennis Riese understood that it was money that Volpe and Moskowitz were after, he unequivocally objected to the entire idea (319a, 320a):

FS Money.

DR Yet you are worried about risking something and that's the worst thing.

JV But that's the only thing we can work.

DR The worst thing.

JV That's the only way we can work it out though, there is no other way because it can't go any place, walk in and walk out, and not pay for a dinner or anything like that, it's impossible.

JM Look, we have explored all the situations before you even came down here, otherwise we would have been coming down and taking people out.

JM You guys, you guys are more or less . . .

JV This, this is the only way because we can see this is the way it is done other places.

JM We, we've got our jobs but, I have certain circumstances that put me in a situation where there's more things that I need.

DR What do you mean?

JM I have been on this job roughly a year, two years, with IRS, it's good money as long as you are willing to live within the means. I am getting married, more or less, I want more for her than I can give her on my pay, not talking big money, you know.

DR I don't want you guys to think that aha, I want favors and I am not going to come through on that because just like you have a lot to, you know, at stake, we have got an awful lot at stake, you know. I'm not naive. It came to my mind, the whole conversation, and I am really, I am very, very, very reluctant to do it.

JM Yeah, we were also.

JV You're reluctant! We are more reluctant than you. We talked about this for a week now, you know, and like I proved it to him, it works, that's all I can say and he can bear me out, he knows it works. (Emphasis added.)

Faced with a man who did not want to break the law, Volpe and Moskowitz resorted to an incredible tactic: They said what they were doing was legal, was not "crooked" (320a,321a):

JV You can keep on with it. You got to remember that your green card, that's a biggy, and we can do it, it can eventually be done. That's bigger than giving that piece of paper to you now. You know what I'm saying, because that's going through, like ahh, eight or ten channels where my name or his name is going to be on something and it's got to be golden on paper, otherwise, they are going to kick it back, we can make it golden.

JM We know the setup of the Immigration Service, he better than I, he has been there longer, more or less, if you are, I am not saying you have to get crooked, more or less, if you know the angles.

JV We are not being crooked.

JM That's why guys run after lawyers. That's why this guy charges $2,000, he knows the angles, the angles don't always work but most of the time, if you know what you are doing, right, you get results.

JM As I more or less explained.

JV You know it, as far as it being crooked.

FS 500 bucks to (1-second unintelligible)

JV As far as being crooked, it is not being crooked, it's a slight favor. (Emphasis added.)

Although Riese indicated that he was very reluctant to do what was being asked, John Volpe, not being satisfied with the results, offered to give them time to think about it (321a). Dennis Riese still indicated that he would not pay money (321a):

DR But I would not pay the money.

JV Well, that's up to you, that's not up to us.

JM He is not worth it to you, right?

R I can't say anybody is worth it to me. (Emphasis added.)

Volpe then threatened, in effect, to ruin the entire chain of restaurants, and asked whether "the chain itself" were "worth it" (321a):

JV Well how about the chain, like we were talking before, the chain itself has got to be worth it to you, so that you don't get botched up and kicked around all the time. (Emphasis added.)

Not even this powerful threat made Riese a willing participant. He continued to refuse to pay money (323a):

DR I would like not to be a part of that, I mean, I just have too much at stake to be a party to that. (Emphasis added.)

At the close of this meeting, although Volpe and Moskowitz had repeatedly asked for money, there was still no offer of a bribe by Dennis Riese.

May 7, 1975

On this date, Dennis Riese forwarded a letter to Eamonn Dolan, his immediate supervisor (391a). In this letter, Riese stated that he expected his stores to be hit hard by Immigration officials because he intended to tell them, on May 13 or 14, that he was going to turn down their illegal suggestions.

May 10, 1975

On this date Dennis Riese had a conversation with Mr. Dolan, in which he made it clear that he did not want to pay money to the agents, but feared the consequences of his refusal to do so. Government witness Dolan testified as follows (27a, 28a):

> The reason that he gave me for that was that he and Fred Steinberg were going to have a second meeting with the Immigration authorities and as a result of the meeting he expected reprisals whereby he and Fred Steinberg would be refusing to make a deal which was suggested by the Immigration authorities and which they were about to refuse.
>
> I asked him, I said, "What kind of a deal are you talking about?"
>
> * * *
>
> Q Do you remember the words that were used, Mr. Dolan?
>
> A Well, what he said was -- when I said to him, "What kind of a deal, what are they talking about?" And he says, "These people are looking for money."

I said, "That sounds unbelievable."

I said, "Are you sure?"

And he says, "Yes." (Emphasis added.)

May 14, 1975

Fred Steinberg had a meeting on this date with John Volpe and Joel Moskowitz. During this meeting Steinberg informed Volpe and Moskowitz that the company did not want to get involved (333a). It was in this conversation, however, that Fred Steinberg made reference to selling green cards for $1,000 per person. It was at some time after this initial statement that a scheme was hatched wherein aliens would pay $1,000 each to John Volpe and Joel Moskowitz in return for a green card.

During this same conversation the agents repeatedly assured Steinberg that everything was going to be legal (345a).

Dennis Riese was not present during this conversation. The agents plainly believed he was not yet involved, and thus made a decision to try to get him involved by getting him to sign employee applications, an entirely legal act which would nevertheless enmesh him.* When Fred Steinberg

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* The signing of a Form MA7-50B by an employer for an alien was a perfectly normal and legal act in the process of obtaining authorization for an alien to work (Tr. 758-9).

left John Volpe's and Joel Moskowitz' presence for a while, Volpe whispered to Moskowitz (346a,347a):

> JV I'm trying to angle him. If we can get Dennis to sign we'll have all the people together and we want some of these guys there too. (PAUSE) A thousand dollars a green card, 20 people get twenty people at one time, we'll take it and bust them. (Emphasis added)

John Volpe and Joel Moskowitz then started to inject Dennis Riese's name into the conversation with Steinberg as much as possible (347a,348a,357a).

May 21, 1975

Fred Steinberg had two telephone conversations with John Volpe. In the first, Volpe stated that he was going to raid a Brew Burger restaurant and that Fred Steinberg should direct him to a particular restaurant. In the second conversation, Fred Steinberg identified several stores which could be raided.

May 22, 1975

On this date, the agents carried out a raid at one of the stores mentioned by Steinberg. Riese, who lived a few blocks away, stopped at the store during the raid. Volpe attempted to explain the plan to Riese,

but Riese, after Volpe made a reference to money, expressed shock and ignorance (364a):

JV Give us the money when we give them the form.

DR I don't know anything about this. I don't even know what you're talking about about money, shit, Fred you must know what he's talking about. (Emphasis added.)

John Volpe, in the presence of Dennis Riese, continued to imply that everything was going to be conducted in a legal manner (364a, 365a):

JV Oh, give them [the aliens] the forms. Let them fill out the forms and fill them out and get them signed. Ya know, whoever's gonna sign 'em for the labor certs, and then we're done. Alright? 'Cause I'm gonna create regular files, then they'll have authentic green cards and in five years they can adjust to USC's [United States Citizens].

JM If they want to.

JV Yeah, if they want to in five years.

JM They don't have to.

FS That's five years they can work.

JV They can adjust to a United States Citizen.

JM That's about right. (Emphasis added)

At the trial, Volpe testified as follows concerning these and similar statements the agents had made (Tr. 456, 36a):

Q During this time you told Mr. Riese and Mr. Steinberg that all the things you were doing were legal, didn't you?

A Yes ma'am.

Q If they lost the green cards they were given, you were giving, people could go back and get new ones?

A Yes.

Q Five years hence they would be able to become U.S. citizens?

A Yes.

Q You said you were playing the angles like a lawyer would play, didn't you?

A I didn't say that, ma'am.

Q Did Mr. Moskowitz say that?

A I believe so.

Q You wanted to make sure that these people knew that all of this was legal, didn't you? You wanted Mr. Steinberg and Mr. Riese to think that everything you were doing was legal, didn't you?

A Yes, ma'am. (Emphasis added)

At the end of the meeting, John Volpe and Joel Moskowitz drove Fred Steinberg to a location where his car was parked. During this automobile ride, they discussed signing the various labor certifications. Fred Steinberg indicated that he was going to sponsor the aliens, but Volpe, again trying to involve Riese, interjected that the signatories should be Steinberg and Riese (387a, 388a):

JV Ya know, like on the labor certs for the five guys, the company's gonna sponsor them, right? I'm not getting no flack from your end on that.

FS No, I'm sponsoring them, I'm the sponsor.

JV Yeah, well you said you and Riese are gonna sponsor them, right?

FS Yeah, well me and somebody else.

JV So, as long as somebody signs those things because I can't put blank forms in the file.

FS Yeah, I know.

JV So, as long as they're signed and somebody opens, oh, this is legal, it's signed, no sweat, alright.

JM It's to your benefit too, that you don't sign all of them.

JV Oh, no.

JM Besides putting in an I-130.

JV I can't get five, five off of one guy signing tham [sic], right off, ya know Because they, ya know, they go onto a different floor. They're gonna be reviewed. I'm gonna put a rush on 'em, and get 'em back.

FS Well, I'll just take care of it and I'll say DENNIS, he doesn't wanna get involved with anything not legal. So, I'll say you just sign, these people came to you looking for a green card and you just fill out the labor certification.

JM Yeah, that's all.

FS You have nothing to do with the rest of that.

JV Well, ya know, the employer does have one form to fill out for the Labor Department that I gave ya's. Alright, and then you, you've gotta sponsor them. But, like if they call up the company, and say who is FRED STEINBERG? Does he have authorization to sign this thing or is his title such-and-such as he

stated on this form?

JM Sure he is.

JV That's all we want is to make sure it is, ya know, 'cause I don't care who signs 'em ya know, if you can't have five people signing. Ya know, one guy signing for five. Because then they're gonna look at it downstairs. If they see you're in charge of ten stores and you sign for two. RIESE is in charge of fifteen stores and he signs for three cooks or three waiters or something. (Emphasis added)

Apparently, up to this stage of the so-called investigation, the authorities felt that there was not enough evidence to tie Dennis Riese into an illegal scheme. It is quite clear that during this period a massive and concerted plan was being developed behind the scenes, among members of several government agencies, to "get" Dennis Riese, even though Riese had repeatedly refused to pay or offer bribes. Pursuant to this governmental scheme, Volpe and Moskowitz were instructed to get more evidence on Dennis Riese in order to be able to prosecute:

Q You never heard Riese say he was going to sponsor them up to this point?

A No, that's right, sir.

Q In fact, you never heard Riese say he was going to sponsor anyone?

A That's right, sir.

Q And then you told him [Fred Steinberg]: "I can't get five off of one guy signing them because, you know, they go on to a different floor. They're gonna be reviewed. I'm gonna put a rush on 'em and get 'em back." That was a lie, was it not?

A That's right, sir.

Q And yo anted somebody other than Steinberg to sponsor these, isn't that right?

A Those were my instructions, yes.

Q Who instructed you to get Riese to sponsor them?

A The FBI

Q Who in the FBI said, "Get Riese to sponsor some of them?"

A They said they needed more evidence on Riese so they asked for us to see if he would sign the forms like they said he was going to do so I continued to use his name.

Q They said to you. Who is they? Who is they who said that to you?

A Special Agent McCormack.

Q Now, before this meeting on May 22nd, do I Understand you had a meeting with Special Agent McCormack and he said to you: "We need more evidence on Riese, see if you can get him to sign one." Is that what you're telling us?

A Yes, sir.

Q And was Moskowitz there when he said that to you?

A I believe so, yes, sir.

Q And is that why you were asking Steinberg to get Riese to sign something?

A Not only for that reason, sir.

Q What other reason?

A He was the only other man we spoke to that was a supervisor in Brew Burger other than Mr. Bravo who said nothing when we met him. (Tr. 663-665, 86a-88a; emphasis added.)

* * *

Q Now you said they. Anybody other than Agent McCormack tell you: "Get Riese to sign some application?"

A He was assisted by Special Agent Sibley.

Q Sibley?

A That's right.

Q Did you hear Sibley say, "See if you can get Riese to sign some application?"

A I don't remember the exact content of the conversation.

Q Well, the substance. Did Sibley say anything that even sounded like: "See if you can get Riese to sign some application?"

A We spoke about this investigation, yes, we did.

Q And they said, "We don't have enough evidence on Riese," isn't that right?

A To that effect, yes. (Tr. pp. 667-668; emphasis added.)

This meeting of May 22, 1975 was the last contact Dennis Riese had with John Volpe or Joel Moskowitz. Riese did, however, have conversations with certain aliens in the employ of Brew Burger restaurant.

Naree Vongchan

Ms. Vongchan testified that Dennis Riese told her that Fred Steinberg had a friend in the Immigration and

Naturalization Service. She went on to say that Dennis Riese told her that these Immigration Officers told Fred that they could apply for a green card for somebody and that it would cost $1,000. Dennis Riese told her that he did not want to get involved with this thing (Tr. 823).

Chayanon Vongchan

Vongchan testified that his sister told him that she heard, from Dennis Riese, that Fred Steinberg had friends in Immigration who could help him (Tr. 833).

Avinash Vashisht

Vashisht testified that he had a conversation with Riese and Steinberg in the latter part of 1974. During this conversation he discussed the problems of getting sponsored for work purposes (Tr. 911). He went on to testify that Dennis Riese gave him a card with the name of an Immigration Officer written on it (Government Exhibit 14). At some later date, Steinberg told him that he had friends in the Immigration Department and that they may be able to get Mr. Vashisht a green card (Tr. 923).

Thereafter, Dennis Riese spoke to Mr. Vashisht, and said that he had been talking to Immigration officials and that Vashisht could obtain a green card if he could spare $1,000 (Tr. 924).

Riese said that he did not want to do this, but would do it to help Vashisht (Tr. 926). Vashisht stated at the trial that Riese had said this was "not a right thing to do" (Tr. 926).

Various Other Meetings and/or Telephone Conversations between Fred Steinberg and the Two Immigration Officers

Between May 22nd and June 12th, 1975, Fred Steinberg met with, or had telephone conversations with, John Volpe and Joel Moskowitz on several occasions. Although Dennis Riese was not present, during a meeting on May 27, 1975, John Volpe attempted, through conversation, to maximize Dennis Riese's involvement. It was during this time period that Fred Steinberg filled out some of the immigration forms but had met with resistance in trying to convince Dennis Riese to sign the forms (Government Exhibit 11a):

> FS Listen, I've got a problem. I signed my half, Dennis was reluctant to sign his.
>
> JV Hmmmm.
>
> FS And thirty seconds ago I convinced him that he had better sign them (Emphasis added.)

Subsequently, Dennis Riese signed the forms which were, in turn, turned over to John Volpe and Joel Moskowitz

by Fred Steinberg.

June 12, 1975

On this date there were meetings in Room 2147 of the Commodore Hotel. This was when the five aliens, Avinash Vashisht, Chayanon Vonchan, Phairoj Boonamnauysuk, Giovanni Pirina and Mohammed Ansari each paid $1,000 to Volpe or Moskowitz. After the payments, these aliens were arrested along with Fred Steinberg and Phanvika Tansuttivanich. Dennis Riese was arrested earlier.

POINT I

REGARDLESS OF WHETHER THERE WAS TECHNICAL ENTRAPMENT OR "PREDISPOSITION" IN THIS CASE, THE CONDUCT OF THE INVESTIGATORS HERE WAS SO OUTRAGEOUS AND OFFENSIVE TO PREVAILING STANDARDS OF DECENT BEHAVIOR THAT THE CONVICTION SHOULD NOT STAND. DUE PROCESS OF LAW, AND CONSTITUTIONAL PROHIBITIONS AGAINST THE USE OF EVIDENCE OBTAINED BY THREAT AND TRICKERY, REQUIRE THAT A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN ENTERED IN THIS CASE.

It is one thing for government agents, acting in an undercover capacity, to offer an opportunity to commit a crime to one already engaged or about to engage in criminality.

It is another thing for government agents to pick out a boy of 24 who is innocent of previous criminality, to raid his business establishments excessively (to "blitz" them) and then to demand money in return for ceasing this harassment.*

It is still a third thing for such government agents, finding that the boy does not want to pay them money, to threaten to "cripple" his business (287a)

* Although the indictment charged that the bribery was to induce Volpe and Moskowitz "to do or omit to do acts in violation of their lawful duties," it might be argued that the very opposite was proved. The acts of Steinberg and Riese here were, if anything, for the purpose of getting Volpe and Moskowitz to do their duty properly and evenhandedly, instead of singling Brew Burger out for harassment. Indeed, in view of the testimony that Brew Burger was picked because it was a large chain and many others similarly situated were ignored,

and to insist that what they ask is legal.

What faces us in the case at bar is the third situation. Here, the INS agents, with other government personnel, set out quite coldly and deliberately to trap Dennis Riese, a very young man about whom they had no unfavorable information. They repeatedly raided his business, and then demanded money, insisting that nothing but money would make them stop.

Dennis Riese stood up well, perhaps a good deal better than many would when faced with such a deliberate demonstration of "power" (37a). He said he wanted to get illegal aliens "out of the stores" (269a). He said that paying the agents money would be "the worst thing" (319a) and said that he was "very, very, very, reluctant to do it" (320a).

Volpe and Moskowitz were not satisfied. They kept after Riese; they badgered him. But Riese still said that he "would not pay the money," and that nobody was "worth it" to him (321a). He said he had "too much at stake to be a party to that" (321a).

Volpe and Moskowitz, in the face of these statements, pulled out all the stops. We wonder whether their superiors condoned what happened next. It is hard to believe that any responsible law enforcement officer would condone it.

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a charge of selective prosecution might be made. Cf. United States v. Berrios, 501 F. 2d 1207 (2nd Cir. 1974).

Not content with the pressure they had applied already, Volpe and Moskowitz threatened to destroy the "chain itself", asserting that if they were not paid, the restaurants would "get botched up and kicked around all the time" (321a).

This was not mere inducement, not mere suggestion, not mere furnishing of an opportunity to commit a bribery; it was coercion. It was a drastic tactic, a cynical effort to cause a bribery, adopted at a time when it was clear that Riese would not pay money absent drastic tactics.

Volpe and Moskowitz then added to this threat the statement that they were "not being crooked" and that paying them money "is not being crooked" (320a, 321a). These were not casual or facetious remarks. Volpe testified at the trial that he actually intended to convince Riese that "everything [he was] doing was legal" (36a). This was a shocking thing. It was just the sort of stimulus a young man, trying to be honest but already under enormous pressure, could be expected to respond to, even against his better judgment.

We do not say that government agents attempting to uncover criminals cannot use undercover methods, that they can never use deception. Undercover agents constantly tell untruths, and perhaps properly, to apprehend criminals. Usually, they lie about their identities. The lie here was totally different in kind from the ordinary lie, however, It was a

special lie. If there is any misstatement absolutely forbidden to government agents, it is the one made by Volpe and Moskowitz.

A government agent simply cannot, in his very persona as government agent, induce a criminal act by means of the false representation that the act is not a crime. If he can, no one is safe. The statement that an act is legal, when it comes from a government official whom the victim knows to be a government official charged with administering the very law involved, is a very powerful statement indeed.

Where such a statement is falsely made by a government officer in order to cause the commission of a crime, the officer's conduct can only be termed outrageous and intolerable. Such conduct is triply offensive when it is directed at an inexperienced youth of unblemished background, and where it is combined with the threat of commercial destruction.

Such conduct, we think, requires reversal of the conviction and dismissal of the indictment. No government has the right to cause a person by deceit and threats to commit a crime, and to convict him therefor on evidence obtained by deceit and threats.

This is not an argument based on entrapment.* While we believe Dennis Riese was indeed the victim of entrapment and is entitled to a judgment of acquittal on that basis (see

*At the argument of defendant Riese's post-trial motions, which included this point, Judge Wyatt stated, "I think the arguments made are certainly serious..." (May 14, 1976, tr. 26). The Judge denied the motions, however, apparently on the erroneous assumption that the argument was based on entrapment, and that the jury had decided that question.

Point II below), the present argument flows from fundamental principles of constitutional law governing what the government may and may not do to obtain a conviction, no matter how heinous the crime or evil the defendant.

It is settled that a criminal conviction cannot stand if it rests on evidence obtained from the defendant by force, Brown v. Mississippi, 297 U.S. 278 (1936), or by threat, Lynumn v. Illinois, 372 U.S. 528, 531 (1963) ("'They had said I had better say what they wanted me to, or I would lose the kids.'"); cf. Rule 11(d), F.R. Crim. P. Nor may a conviction rest on evidence obtained by the kind of deception which overcomes the will of the defendant. See Spano v. New York, 360 U.S. 315 (1959), wherein a police officer who was a childhood friend of the defendant was sent to obtain a confession by falsely stating that if the defendant did not confess the officer would be in trouble, that his job would be in jeopardy, and that this would be disastrous for his family (p. 323). After being subjected to this pressure for four sessions of interrogation, the defendant confessed. Reversing the conviction, the Court said (pp. 320-321):

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

It is plain that the investigators here caused the commission of a crime by threats and deception. The pressure of their threats and lies continued to operate on defendants as the agents gathered the evidence--including the tape recordings--which would be used to convict. In a very real sense, the conduct here was more reprehensible than that in Lynumn and Spano. Here, not only the evidence, but the crime itself, was procured by illegal means.

The above cases deal, of course, with the exclusion of illegally obtained evidence. There is very clear authority, however, that investigative methods which are simply indecent and intolerable may bar prosecution. We discuss these cases below.

It is worthwhile first to pause at the exclusionary-rule cases, for the background which they give us. It is seen that the exclusionary-rule cases arise from a judicial antipathy to illegal or unconstitutional conduct, from a desire to find an effective deterrant to such conduct, and from an unwillingness to permit the courts to become accomplices in such conduct.

We think there is a connection between the exclusionary-rule cases and the cases, discussed below, establishing the principle that prosecutions resulting from unconscionable government conduct will be prohibited. The same philosophy underlies both groups of cases, and both groups of cases arose

because of the pernicious, yet seemingly ever-present, notion that the end can justify the means. Although we are not dealing with entrapment in a strict sense in this point, the following observation about entrapment illustrates the connection we have referred to:

> "Clearly entrapment is a facet of a broader problem. Along with illegal search and seizures, wiretapping, false arrest, illegal detention and the third degree, it is a type of lawless law enforcement. They all spring from common motivations. Each is condoned by the sinister sophism that the end, when dealing with known criminals or the criminal classes, justifies the employment of illegal means." Donnelly, Judicial Control of Informants, Spies, Stoolpigeons, and Agents Provacateurs, 60 Yale L.J. 1091, 1111 (1951).

There can be no doubt that the exclusionary rule which applies to illegally seized evidence and the rule prohibiting prosecutions resulting from outrageous governmental conduct flow, not entirely from a desire to redress wrongs done to individuals, but also from a desire both to deter governmental illegality and to protect the courts from being used as accomplices in transgressions of the law.

As the Court said in United States v. Calandra, 414 U.S. 338, 347 (1974), referring to the exclusionary rule, ". . . the rule's prime purpose is to deter future unlawful police conduct. . . ." No less important is what the Court in Elkins v. United States, 364 U.S. 206 (1960), referred to as the "imperative of judicial integrity" (p. 222). The Court in Elkins, citing McNabb v. United States, 318 U.S. 332, 345

(1943), pointed out that a conviction resting upon illegally obtained evidence (p. 223)

> "'. . . cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law.'"

Similarly, in Weeks v. United States, 232 U.S. 383 (1914), one of the earliest cases establishing the exclusionary rule, the Court held that unwarranted practices destructive of constitutional rights "should find no sanction in the judgments ofthe courts. . . ." (p. 392).

The tendency of law enforcement officers to resort to an "ignoble shortcut to conviction," Mapp v. Ohio, 367 U.S. 643, 660 (1961) reh. den. 368 U.S. 871 (1961), cannot be turned aside by mere disapproval. Indeed, we fear that the more devoted to duty the officer, the more probable it is that his zeal will lead him beyond the boundaries of propriety. Only by prohibiting the prosecutions or the use of evidence resulting from wrongful conduct, and thus eliminating any incentive to engage in it, can the problem of overreaching by zealous prosecutors more interested in ends than means be solved. As the Court said in Elkins v. United States, supra (p. 217),

> "The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it." (Emphasis added.)

In addition to the exclusionary-rule cases, there has slowly developed a line of cases indicating that prosecutions will be prohibited if they result from investigations tainted

by intolerable governmental conduct. One of the earliest expressions of judicial distaste for government law-breaking is found in the now famous dissent of Justice Brandeis in Olmstead v. United States, 277 U.S. 438, 485 (1928). In Elkins v. United States, supra, 364 U.S. 206 (1960), the Court quoted from the dissent of Justice Brandeis in Olmstead (p. 223),

> "'In a government of laws,' said Mr. Justice Brandeis, 'existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.'"

Justice Brandeis was concerned not only with government law-breaking and the idea that the end justifies the means; he was also concerned with the dignity and integrity of the courts, just as the judges who decided the exclusionary-rule cases were. Justice Brandeis went on to say in Olmstead (p. 480),

> "To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue."

Justice Holmes also dissented in Olmstead, and his feelings were much the same. He believed that the government does not escape the stigma of its agents' illegality merely by expressing disapproval of it, so long as it insists upon exploiting that illegality. He also believed that if the courts do not take action to prevent governmental illegality, they in effect approve it.

Justice Holmes said (p. 470),

> "It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in the future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.
>
> "For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." (Emphasis added.)

Similar concerns have been expressed by other Justices in the few Supreme Court cases which have dealt with the problem of entrapment. For example, in Sorrells v. United States, 287 U.S. 435 (1932), Chief Justice Hughes, writing for the Court, said (pp. 441, 442),

> "It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises."
>
> * * *
>
> ". . . A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition

to commit the alleged offense and induce its commission in order that they may prosecute."

Although in Sorrells, as in other entrapment cases in the Supreme Court, the element of predisposition was deemed vital, nevertheless the Chief Justice was concerned with the proper function of law enforcement officers. He said (p. 444), citing Butts v. United States, 273 F. 35, 38 (8th Cir. 1921),

> "The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it."

Justice Roberts wrote a separate opinion in Sorrells, which was concurred in by Justices Brandeis and Stone. Justice Roberts believed that the entrapment defense grows out of the refusal of the Courts to allow their processes to be used to perpetrate a wrong:

> "There is common agreement that where a law officer envisages a crime, plans it, and activates its commission by one not theretofore intending its perpetration, for the sole purpose of obtaining a victim through indictment, conviction and sentence, the consummation of so revolting a plan ought not to be permitted by any self-respecting tribunal. Equally true is this whether the offense is one at common law or merely a creature of statute. Public policy forbids such sacrifice of decency." (pp. 454-55; emphasis added.)
>
> * * *
>
> "This view calls for no distinction between crimes mala in se and statutory offenses of lesser gravity; requires no statutory construction, and attributes no merit to a guilty defendant; but frankly recognizes the true foundation of the doctrine in the public policy which protects the purity of government and its processes. Always

> the courts refuse their aid in civil cases to the perpetration and consummation of an illegal scheme. Invariably they hold a civil action must be abated if its basis is violation of the decencies of life, disregard of the rules, statutory or common law, which formulate the ethics of men's relations to each other. Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong." (p. 455; emphasis added).

In Sherman v. United States, 356 U.S. 369 (1958), another of the Supreme Court cases dealing with the entrapment defense, Justice Frankfurter, concurring in the result, said (p. 380),

> "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced. . . . Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them."

The views of Justice Frankfurter above quoted have never been incorporated in toto in the technical defense of entrapment as the Supreme Court has interpreted it; i.e., in strict entrapment cases, the defendant's predisposition has been just

as important a subject for inquiry as the policeman's conduct. Nevertheless, as we show below, there are defenses other than classical entrapment which arise from wrongful government conduct. It is in these cases that the philosophy of Justices Roberts, Brandeis, Holmes and Frankfurter has survived.

In Greene v. United States, 454 F.2d 783 (9th Cir. 1971), for example, a government undercover agent introduced himself as a "syndicate" criminal to defendants, who were admittedly already engaged in a bootlegging operation. The agent reached an agreement equivalent to a partnership agreement with the defendants, which provided for the manufacture, sale and distribution of bootleg alcohol under governmental financing. The agent actually provided 2,000 pounds of sugar, offered to supply bribe money to one of the defendants, and actually purchased the defendants' shipments of illegal spirits. After purchasing several shipments, and paying for them, the agent arrested the defendants. The Court said (p. 787),

> "We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators . . .But, although this is not an entrapment case, when the Government permits itself to become enmeshed in criminal activity, from beginning to end, to the extent which appears here, the same underlying objections which render entrapment repugnant to American criminal justice are operative." (Emphasis added.)

Another line of cases, principally narcotics cases, held that where the government has itself supplied the contraband which the defendant later sold or possessed, then this, without more, was "entrapment as a matter of law," irrespective of the defendant's predisposition. See, e.g. United States v. Bueno, 447 F. 2d 903 (5th Cir. 1971), cert. den. 411 U.S. 949 (1973) (narcotics); United States v. Chisum, 312 F. Supp. 1307 (C.D. Cal. 1970) (counterfeit money).

It was thought by some that the reasoning of these cases had been undercut by United States v. Russell, 411 U.S. 423 (1973), wherein the Court held that there was no "entrapment as a matter of law" where the government agent had done no more than supply the defendant with an essential ingredient for the manufacture of an illegal drug. Despite Russell, many Courts continued to feel disturbed by the idea that the government could prosecute a person for dealing in narcotics which the government had itself supplied. Several cases, therefore, held that these circumstances would give rise to the defense of "entrapment as a matter of law," distinguishing Russell on the ground that the agent there had not actually supplied illegal contraband. See, e.g. United States v. Oquendo, 490 F. 2d 161 (5th Cir. 1974); United States v. Mosley, 496 F. 2d 1012 (5th Cir. 1974) affd. en banc. 505 F. 2d 1251 (1974); United States v. West, 511 F. 2d 1083 (3rd Cir. 1975). It has now been made clear by the Supreme Court, however, that the doctrine of "entrapment as a

matter of law" does not apply, and that the defendant's predisposition must be explored, in cases where the government has done no more than supply the contraband. Hampton v. United States, ___ U.S. ___, 48 L.Ed. 2d 113 (1976).

But there is another focus of inquiry. Even though the doctrine that entrapment exists wherever the government supplies the contraband may have been dealt a mortal blow, there remains the doctrine that outrageous governmental conduct may bar a prosecution as a matter of due process of law.

This doctrine was recognized in United States v. Russell itself, wherein the Court said (pp. 431-32),

> ". . . we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 U.S. 165 (1952)...."

Rochin v. California, 342 U.S. 165 (1952), cited in the above-quoted passage from Russell, is worth noting. There the Court described due process of law as "'those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses'" (p. 169). The Court in Rochin went on to say (p. 172),

"Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents -- this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and screw to permit of constitutional differentiation.

"It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained."

More recently, in United States v. Archer, 486 F.2d 670 (2nd Cir. 1973), this Court discussed the problem of outrageous government conduct. In Archer, government agents had devised a scheme to detect alleged corruption in the administration of justice in Queens County, although they had no idea that the particular defendants ultimately arrested might be involved. Pursuant to the scheme, a staged arrest of one of the agents for a non-existent crime was created. A false arrest affidavit was filed, and the fictitious defendant thereafter gave false information on numerous occasions to probation officers, policemen and judges. Ultimately, the government agents told lies under oath to a grand jury, all in the interest of maintaining verisimilitude. It was argued by the government that none of these events invaded any right of the defendants.

The inescapable fact was, however, that the government had perverted the criminal justice system.

Although it did not base the reversal of the convictions upon this conduct, the Court vigorously criticized the investigators, saying (p. 672),

> "We do not at all share the Government's pride in its achievement of causing the bribery of a state assistant district attorney by a scheme which involved lying to New York police officers and perjury before New York judges and grand jurors; to our minds the participants' attempt to set up a federal crime for which these defendants stand convicted went beyond any proper prosecutorial role . . ." (Emphasis added.)

The Court also said,

> "We are not sure how we would decide this question if decision were required. Our intuition inclines us to the belief that this case would call for application of Mr. Justice Brandeis' observation in Olmstead. Even though that view has not been incorporated in the entrapment defense, there is certainly a limit to allowing governmental involvement in crime. It would be unthinkable, for example, to permit government agents to instigate robberies and beatings merely to gather evidence to convict other members of a gang of hoodlums. Governmental 'investigation' involving participation in activities that result in injury to the rights of its citizens is a course that courts should be extremely reluctant to sanction." (pp. 676-77; emphasis added.)
>
> * * *
>
> "Since we conclude reversal to be required on another ground, we leave the resolution of this difficult question for another day. We hope, however, that the lesson of this case may obviate the necessity for such a decision on our part." (p. 677).

In United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), the Court, citing United States v. Archer, supra, among other authorities, appears to have converted large parts of its dicta in Archer to a square holding. In Toscanino, the defendant charged that government agents had sought him out in a foreign country, and, both to gain information and to acquire jurisdiction of his person, had bribed foreign governmental officers and telephone company officials, and had kidnapped the defendant, among other things. Despite these claims, he had been convicted of a narcotics offense. On appeal, the Court remanded the case for a hearing on the issues raised by the defendant's charges. The Court referred (p. 274) to Justice Brandeis' famous condemnation of government lawbreaking in his dissenting opinion in Olmstead v. United States, 277 U.S. 438 (1928), which is quoted above. The Court said (p. 274),

> "Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law. See United States v. Archer, supra, at 677."

The Court also said (p. 274),

> "In United States v. Archer, supra, while basing our decision on other grounds, we referred to Olmstead and Rochin for the proposition that due process principles might be invoked to bar prosecution altogether where it resulted from flagrantly illegal law enforcement practices."

The Court then held (p. 275),

> "In light of these developments we are satisfied that the 'Ker-Frisbie' rule cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." (Emphasis added.)

We assume that the government in the case at bar will argue that Hampton v. United States, supra, 48 L. Ed. 2d 113 (1976), has done away with the notion that there is some test which may be applied to government conduct other than the test of the entrapment defense. There is indeed a sentence in the opinion of the Court in Hampton which can be said to lend support to this argument. Justice Rehnquist, announcing the judgment of the Court in Hampton, said (p. 118),

> "We ruled out [in Russell] the possibility that the defense of entrapment could ever be based upon governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established."
>
> * * *
>
> "The remedy of the criminal defendant with respect to the acts of government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment."

It would be possible to find a way around the second sentence above quoted, but we need not, since that sentence represents the views of only three Justices of the Court. The opinion of the Court in Hampton was a three-Justice plurality opinion; Mr. Justice Rehnquist was joined therein by Chief Justice Burger and Mr. Justice White. A five-Justice majority of the Court, consisting of the two Justices who concurred in the result (Justices Powell and Blackmun) and the three Justices who dissented (Justices Brennan, Stewart and Marshall), specifically disagreed with the plurality's notion that the entrapment defense is the sole remedy for a victim of governmental misconduct.*

Justice Powell, who wrote the concurring opinion, said (p. 121),

> ". . . I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles."

In a footnote, Justice Powell said (p. 120, n.2),

> "I agree with the plurality that Russell definitively construed the defense of 'entrapment' to be focused on the question of predisposition. 'Entrapment' should now be employed as a term of art limited to that concept. . . . This does not mean, however, that the defense of entrapment necessarily is the only doctrine relevant to cases in which the Government has encouraged or otherwise acted in concert with the defendant." (Emphasis added.)

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* Justice Stevens took no part in the consideration or decision of the case.

Justice Powell also observed that the Court's supervisory power might also "support a bar to conviction" even in a case "where the Government is able to prove predisposition" (p. 122). It is noteworthy that the concurring opinion cites United States v. Archer, supra, 486 F.2d 670 (2d Cir. 1973), and the concurring opinion of Justice Frankfurter in Sherman v. United States, supra, 356 U.S. 369 (1958), as possible sources for a doctrine placing constitutional limits on police involvement in crime.

Justice Powell recognized that defining the limits of government conduct in particular situations might be difficult, but did not see this as a bar to the testing of government conduct against the Due Process Clause. He suggested that the character of the problems confronted by law enforcement officers might well be an important factor. Suggesting that these problems are much more difficult to solve in narcotics cases, he seemed to suggest that such cases might be dealt with on a different basis than other alleged crimes (p. 122, n.7).

In view of this suggestion, it is worth noting that the instant case is not a narcotics case, and that no facet of it touches upon the narcotics trade.

The dissenting opinion in Hampton was written by Mr. Justice Brennan. He and the other two dissenters expressly agreed with Justices Powell and Blackmun that the entrapment defense does not necessarily end the inquiry where government misconduct is involved. Justice Brennan said (p. 123),

> ". . . I agree with Mr. Justice Powell that Russell does not foreclose imposition of a bar to conviction -- based upon our supervisory power or due process principles -- where the conduct of law enforcement authorities is sufficiently offensive, even though the individuals entitled to invoke such a defense might be 'predisposed'."

Unlike the concurring Justices, the dissenting Justices felt that the furnishing of drugs in Hampton was beyond permissible limits.

The concept that government conduct which encourages crime, even conduct "in concert" with the defendant, may be sufficiently obnoxious to bar conviction despite the defendant's alleged predisposition is now firmly established by the Hampton case. For the reasons stated above, this concept should be applied in the case at bar.

Here, the agents quite clearly did more than simply "encourage" the commission of a crime. By stating to a 24-year-old boy that they would destroy the business if they were not paid money, on the one hand, and by insisting that what they asked was legal, on the other hand, the agents created a kind of pressure to commit a crime which was virtually irresistible. Such conduct violates long-settled principles outlawing threats and deception in the gathering of evidence, and in any event, was simply indecent.

Such tactics should be forbidden, we urge, as a matter of due process of law and pursuant to the Court's supervisory power.

POINT II

EVEN IF ONLY THE TECHNICAL RULES OF ENTRAPMENT APPLY, NEVERTHELESS ENTRAPMENT WAS AMPLY DEMONSTRATED, AND DEFENDANT RIESE WAS NOT SHOWN TO BE PREDISPOSED. WHERE GOVERNMENT AGENTS SET OUT TO TRAP A YOUTHFUL SUSPECT OF BLAMELESS BACKGROUND BY RELENTLESS APPLICATION OF UNBEARABLE PRESSURE, MORE THAN MERE "READY RESPONSE" TO INDUCEMENT MUST BE SHOWN TO PROVE PREDISPOSITION (AND EVEN THAT WAS LACKING HERE). A CONTRARY HOLDING WOULD, IN EFFECT, SANCTION GOVERNMENT INVASION OF THE CONSTITUTIONAL RIGHT OF PRIVACY.

We regard this case as virtually indistinguishable from Sherman v. United States, 356 U.S. 369 (1958), so far as the issue of classical entrapment is concerned. In Sherman, a government informer, Kalchinian, met Sherman at a doctor's office where both were being treated for narcotics addiction. After several accidental meetings, Kalchinian started to ask Sherman for the name of a source for narcotics. Sherman "tried to avoid the issue" (p. 371). He finally acquiesced "after a number of repetitions of the request" (p. 371). Thereafter, Sherman obtained narcotics on a number of occasions, which he shared with Kalchinian. Kalchinian then informed agents of the government that he had uncovered a seller, and thereafter on three occasions the agents observed Sherman selling narcotics to Kalchinian in return for government money. Sherman was convicted at trial, the jury having decided the issue of entrapment adversely to him. The Supreme Court described the factual issue

in the case as follows (p. 371):

> "At the trial the factual issue was whether the informer had convinced an otherwise unwilling person to commit a criminal act or whether petitioner was already predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade."

The Court reversed the conviction, and remanded the case with instructions to dismiss the indictment. Holding that Sherman had fallen into a "trap for the unwary innocent" rather than a "trap for the unwary criminal" (p. 372), the Court concluded that "entrapment was established as a matter of law" (p. 373)*. The Court, in so doing, was not usurping the jury's function. It reached its conclusion on the basis of the undisputed evidence. As in the case at bar, the only witnesses were those called by the prosecution. The Court said (p. 373),

> "We conclude from the evidence that entrapment was established as a matter of law. In so holding, we are not choosing between conflicting witnesses, nor judging credibility. Aside from recalling Kalchinian, who was the Government's witness, the defense called no witnesses. We reach our conclusion from the undisputed testimony of the prosecution's witnesses."

That Sherman had been induced by Kalchinian was "patently clear" (p. 373). The principal battle was fought on the issue

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* This holding is not affected by the decision in Hampton v. United States, supra, 48 L. Ed.2d 113 (1976), that there is no "entrapment as a matter of law" where the defendant is "predisposed." As we show below, the Court in Sherman carefully considered the issue of predisposition, and found as a fact on the undisputed evidence that the defendant was not predisposed.

of predisposition. As in the case at bar, the government "sought to overcome the defense of entrapment by claiming that petitioner evinced a 'ready complaisance' to accede" to the request (p. 375). The government also relied on Sherman's record of two past narcotics convictions. It is noteworthy that nothing remotely similar was offered against Dennis Riese in the present case. The Court found that the government's case was "unsupported," because there was no evidence that Sherman was in the narcotics trade or in possession of any narcotics at the time when he was first approached by Kalchinian (p. 375). The Court also apparently regarded the government's "ready complaisance" argument as baseless in view of "petitioner's hesitancy" (p. 375). The Court regarded Sherman's past convictions as immaterial, since one had been nine years before the events involved, and the other had been five years before the events involved.

The government also pointed out that Sherman had made a series of sales to Kalchinian before the sales for which he was arrested, arguing that this was further evidence of predisposition. The Court flatly rejected this argument, holding that the earlier sales were also the result of Kalchinian's repeated inducement (p. 374):

> "It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement." (Emphasis added.)

Here, as in Sherman, there was "hesitancy" on the part of defendant Riese. Indeed, there was more than "hesitancy"; there was a series of refusals by Riese to pay bribes, in the face of merciless badgering by the agents. Here, as in Sherman, there was no evidence at all that defendant Riese was already engaged in illegal conduct at the time he was approached by the government agents. Indeed, Dennis Riese, unlike Sherman, has no record of convictions for any criminal conduct at all in the past.

It seems to us that the evidence of predisposition in Sherman was far stronger than in the present case, and it seems to us that the evidence of defendant's deep reluctance to commit a crime was far stronger in the present case than it was in Sherman. If Sherman's conviction could not stand, we do not see how Riese's can stand.

Presumably, the government will point to Riese's offer of free dinners. This happened, however, after a program of "blitzing" by the agents, and at a meeting called for the purpose of trying to "work something out." Thus, such offer

must be regarded as being in the same category as the early series of narcotics sales by Sherman; i.e., the offer was simply another "product of the inducement." We respectfully urge that the law requires a good deal more by way of proof of predisposition than what was offered here. It has been held in at least one case that a defendant may be solicited or induced "only when they [the government] have reasonable grounds to believe that he [the defendant] has engaged in unlawful activities." Heath v. United States, 169 F.2d 1007, 1010 (10th Cir. 1948). See also Swallum v. United States, 39 F.2d 390, 393 (8th Cir. 1930), and United States v. Fox, 437 F.2d 733, 735 (7th Cir. 1971), cert.den. 402 U.S. 1011 (1971), wherein testimony as to why the defendant was under suspicion was regarded as important.

We recognize, of course, that in this circuit a "ready response to the inducement" is regarded as admissible to prove propensity. See United States v. Viviano, 437 F.2d 295, 299 (2nd Cir. 1971), cert.den. 402 U.S. 983 (1971). Sherman demonstrates, however, that the claim of "ready response" cannot stand, where the undisputed evidence shows that the defendant "hesitated" and was not engaged in the crime at the time of the inducement. Sherman shows that the Court may reject the claim of "ready response" where the evidence is undisputed, even after the jury has found that the defendant was predisposed. We therefore think it is clear that the claim of "ready response,"

while admissible, is not always sufficient to prove predisposition.

The idea that the government should have "reasonable grounds to believe" that the defendant has engaged in criminal conduct before embarking on a scheme to trap him may not be the law in all cases, and it may be that the quantum of proof can vary with the circumstances. Here, however, the circumstances were such that the scheme to trap Dennis Riese posed many of the problems discussed in Point I above. The scheme became no more than an exercise in overzealousness, and an application of the "sinister sophism" that the end justifies the means. This is precisely because the agents had no reason to believe that Riese was engaged in criminal conduct. Since there was no justification for taking aim at Riese, the agents intruded upon an important constitutional right when they badgered him until he finally committed what the jury found to be a crime.

It is noteworthy that even the plurality opinion of the Court in Hampton v. United States, supra, 48 L. Ed.2d 113 (1976), recognizes that (p. 119)

> "The limitations of the Due Process Clause of the Fifth Amendment, and of those portions of the Bill of Rights which it has been held to incorporate, come into play only when the government activity in question violates some protected right of the defendant." (Emphasis added.)

The right of defendant Riese which was invaded here was the constitutional right of privacy. Because of the intrusion which is inherent in every entrapment scheme, some authorities have suggested that there should be a requirement that a "warrant to encourage" should be obtained before such a scheme is set in motion. See Rotenberg, Police Practice of Encouragement: Lewis v. United States, and Beyond, 4 Houston L. Rev. 609, 620 (1967). See also Osborn v. United States, 385 U.S.323 (1966), reh. den. 386 U.S. 938 (1967), wherein agents who suspected jury tampering obtained court permission, on a detailed factual showing by affidavit, before placing a listening device to investigate the crime.

The Supreme Court has recently noted the danger to the right of privacy which is presented by unreviewable executive discretion in the choosing of means of investigation of crime. In United States v. United States District Court for the Eastern District of Michigan, 407 U.S. 297 (1972), the government had claimed the right to engage in electronic surveillance without court sanction in cases involving a danger to "national security" from the activities of domestic organizations. The Court rejected the claim, holding applicable the provisions of the Fourth Amendment and its warrant requirement, and stating (p. 317),

> "But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The

> historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." (Emphasis added.)

The right of privacy has been described as the right of the citizen generally "to be let alone." Warren and Brandeis, The Right of Privacy, 4 Harv. L. Rev. 193, 195 (1890). In Roe v. Wade, 410 U.S. 113 (1973), reh.den. 410 U.S.959 (1973), the Supreme Court described the genesis of the right of privacy, and its varying contexts, as follows (pp. 152-153):

> "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U.S. 557, 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U.S. 1, 8-9 (1968), Katz v. United States, 389 U.S. 347, 350 (1967), Boyd v. United States, 116 U.S. 616 (1886), see Olmstead v. United States, 277 U.S. 438,478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484-485 in the Ninth Amendment, id., at 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302

> U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1. 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U.S. at 453-454; id., at 460, 463-465 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra."

Plainly, the right of privacy extends into many areas beyond those ivolving simply marriage and the family. As is demonstrated by United States v. United States District Court, supra, 407 U.S. 297, and by the dissent of Justice Brandeis in Olmstead, supra, the right of privacy can be invaded by techniques of criminal investigation which are improper or which are too insensitive to individual dignity.

The right of privacy exists wherever an individual may harbor a reasonable expectation or privacy. For example, in Terry v. Ohio, 392 U.S. 1 (1968), the Court, while upholding Ohio's stop and frisk law, stated (392 U.S. at 9):

> "We have recently held that 'the Fourth Amendment protects people, not places,' Katz v. United States, 389 U.S. 347, 351 (1967), and wherever an individual may harbor a reasonable 'expectation of privacy,' id., at 361 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For 'what

> the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.' Elkins v. United States, 364 U.S. 206, 222 (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland." (Emphasis added.)

We respectfully urge that in the circumstances of this case, Dennis Riese was "entitled to be free from unreasonable governmental intrusion." We cannot represent that the requirement of a "warrant to encourage" has yet been incorporated into our law. But we think it is the law, as Sherman indicates, that the government must have some pre-existing factual basis for interfering with the way in which a citizen lives his life before it sets out to solicit the commission of a crime by that citizen.

At the very least, we urge, once the "opportunity" to commit a crime is offered once and refused, then the government should have far stronger information than it had in the case at bar in order to continue the provocation, in order to badger the individual. Were this not so, we would be faced with investigations which intrude into the privacy of human beings, but which are based merely upon curiosity. We would be faced with investigations designed solely to discover where an individual's breaking point is. Given the proposition that "every man has his price," we would witness the unwholesome spectacle of government agents determining what every person's price may be, at the cost of their right "to be let alone."

This precise point was made in an article in The Wall Street Journal edition of September 22, 1975, wherein the following question concerning entrapment was posed (p. 1, col. 1):

> ". . . Would the accused really have committed such a crime, or planned to commit it, if the undercover agents hadn't egged him on or presented the opportunity?"

* * *

> "It might be that almost everyone is pre-disposed to commit some crime," says Pierce Gerety Jr., a lawyer with the New York Legal Aid Society. "It might be that everybody has his price. Police shouldn't be out finding what a person's price is. They should be looking for crime."

* * *

To summarize, we respectfully suggest that the situation of Dennis Riese in this case is no different from that of the defendant in Sherman v. United States, supra, wherein the Supreme Court held that predisposition was absent as a matter of law, in view of the reluctance which the defendant clearly expressed before finally giving in in the face of repeated requests. This Court has also spoken on the problem of the reluctant criminal, and has stated, in United States v. Anglada, 524 F.2d 296, 299 (2nd Cir. 1975),

> "The defense of entrapment deals with how the crime 'originates' . . . There is no iron-clad rule that the reluctance that indicates a lack of propensity must continue throughout the transaction."

We say that the well-established right of the individual "to be let alone" prohibits the government, in the absence of reasonable grounds for believing the individual is about to engage in a crime, from badgering that individual until his clearly expressed reluctance to commit a crime has been overcome.

POINT III

THE PROSECUTOR, OVER OBJECTION AND IN DEFIANCE OF A COURT RULING, ATTEMPTED TO POISON THE JURY'S DELIBERATIONS BY MEANS OF AN INFLAMMATORY ARGUMENT TO THE EFFECT THAT ALIENS HAD BEEN EMPLOYED BY THE BREW BURGER RESTAURANTS BECAUSE THEY WERE AN ILLEGAL SOURCE OF CHEAP, NON-UNION LABOR. SUCH ARGUMENT WAS UNTRUE, NOT BASED ON EVIDENCE, IRRELEVANT, AND DENIED APPELLANT RIESE A FAIR TRIAL.

From the very beginning of the trial, it was obvious that the government was attempting to buttress an extraordinarily weak case with the suggestion that aliens working at Brew Burger restaurants were there illegally, and were hired only because they were a source of cheap labor who worked long hours. On repeated occasions, the prosecutor tried to introduce evidence that the alien co-conspirators involved in this case were not members of the union, worked long hours and were underpaid (96a, 100a, 101a, 105a).

While making this effort to inflame the jury, the government omitted to point out that all the aliens involved had entered the United States in an entirely legal fashion. The government omitted to point out that even where an alien who holds a tourist visa may be prohibited from taking employment, nevertheless it is not "illegal" for a business establishment to hire that alien.*

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* The Court was requested to instruct the jury with respect to these distinctions. This request was denied by the Court (263a, 264a). It is interesting to point out that the alien co-conspirators have permission to, and presently are working in the United States, contrary to the government's misplaced assertion that the aliens were here illegally.

In the circumstances, the Court sustained objections by defense counsel, stating that the evidence being offered was not relevant and was "absolutely frivolous" (98a). The government insisted on resurrecting the line of questioning (101a). The Court again sustained objections, stating that the questions were "totally irrelevant" (101a).

The Court was plainly correct. References to the hiring of "illegal aliens," where it is in fact not "illegal" for a business establishment to hire them, could serve only to confuse the jury and inject a prejudicial element into the case. Moreover, in a period where the national economy is characterized by high rates of inflation and unemployment, it is not difficult to perceive how a statement made to an average juror who is a working person that cheap, illegal, non-union aliens were given jobs to the exclusion of American citizens would certainly arouse any latent prejudices, and would also tend to enrage and inflame the passions of such juror to the point of jeopardizing his ability to render an unbiased judgment.

We think this is what happened in the case at bar. We respectfully suggest that the defendants were convicted in this case, not because of the evidence, but because of the jury's anger at the supposed employment policies of the Brew Burger chain.

In his summation, and despite objections, the prosecutor saw to it that this would happen. Although the Court had ruled the evidence to be irrelevant, the government's closing argument stressed the proposition that defendants were persons who hired cheap, illegal aliens:

> "And there, ladies and gentlemen, is one of the keys to the case; Mr. Steinberg explained to Moskowitz they have to hire these illegal aliens because it's inexpensive labor, they're the only ones who are willing to work for this amount of money" (128a, 129a).
>
> * * *
>
> "Why are they his friends, because they are going to do something for him, make his job easier, make it easier for him to employ the cheap, illegal aliens as help (131a)."

This was improper, and the prosecutor must have known it was improper.*

In United States v. Guglielmini, 384 F.2d 602 (2d Cir., 1967), a bankruptcy fraud case, this Court reversed the conviction partly because the prosecutor had argued that the defendant there had "learned" about committing fraud in an unrelated case which had taken place years previously.

Similarly, in United States v. Beno, 324 F.2d 582 (2nd Cir., 1963), cert. den. 379 U.S. 880 (1964), this Court said (p. 587),

> "The introduction of these side issues may not be justified as bearing on Beno's intent, since the conduct involved is not of sufficient similarity to that alleged in

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* See ABA Project on Standards for Criminal Justice, "Standards Relating to the Prosecution Function and the Defense Function" §5.8 (Approved Draft, 1971, p. 126), declaring, among other things, that it is unprofessional conduct for a prosecutor to use arguments calculated to inflame the passions or prejudices of the jury, or to divert the jury from its duty to decide the case on the evidence. See also United States ex rel. Haynes v. McKendrick, 481 F.2d 152 (2nd Cir. 1973).

> the indictment to be admissible . . . . This requirement that past crimes be of a similar nature before they are admissible on the issue of intent gives effect to one of the most fundamental notions known to our law -- that a man is entitled to be tried only for specific charges explicitly stated, and should not be compelled to defend a lifetime of conduct." (Emphasis added.)

In United States v. Harris, 331 F.2d 185 (4th Cir., 1964), the Court said (p. 187):

> " * * * [i]t is inconsistent with our traditional conception of a fair trial to permit the introduction of any evidence which might influence a jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged."

And see United States v. Callanan, 450 F.2d 145 (4th Cir., 1971) wherein it was pointed out that (p. 151),

> "Insinuation and innuendo about collateral matters should play no part in the prosecution of a criminal charge. . . . And the prosecutor's argument must be specially scrutinized when the trial judge, alert to potential prejudice, has cautioned restraint. If it is probable that a prosecutor's argument has engendered prejudice, the defendant must be afforded a new trial. . . . The remarks of the government's attorney were improper. The legitimacy of the deductions had not been raised in the bill of particulars and it should not have been introduced into the case. Whether the untoward remarks prejudiced Callanan must be tested by 'the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error.' . . . . "

This Court expressed similar sentiments in United States v. Bugros, 304 F.2d 177 (2d Cir., 1962). The defendant there had been arrested by federal agents who found a package containing cocaine in a closet, and another package of cocaine in the drawer of a child's chest of drawers. During summation, the prosecutor repeatedly castigated the defendant for displaying "reckless disregard of the welfare of children" by placing the drugs in the child's room. This Court, finding this to have been "an immaterial detail," reversed, stating (p. 179),

> "It is the prosecutor's obligation to avoid arguments on matters which are immaterial and which may serve only to prejudice the defendant."

This Court has also expressed itself more recently on the problem of the prejudicial summation. In United States v. Gonzalez, 488 F.2d 833 (2d Cir., 1973), the prosecutor's summation was found by this Court to contain "a host of infirmities" (p. 836). The Court said (p. 836),

> "Among the most prejudicial of the misrepresentations was the prosecutor's characterization of appellant as a 'repeated junk dealer.'"

It seems to us that this incident was no more prejudicial than what took place in the case at bar. An unwarranted reference to other unrelated crimes was made in Gonzalez. In the present case, the prosecutor, in one sense, did something even worse. He tried to create the impression that the conduct of Mr. Riese's organization, the Brew Burger restaurants, had been "illegal" when in fact it had

not. He combined this with insinuation regarding the hiring of cheap, non-union labor clearly designed to create prejudice.

In Gonzalez, this Court said (p. 836),

> "While either of appellant's arguments, concerning the charge and the summation, might be sufficient to reverse the decision below, the combination of the two requires that disposition. Of course, appellant is entitled only to a fair trial, not to a perfect trial. But we think that the confusion which the charge must have created coupled with the passion and the prejudice which the summation likely aroused raises grave doubts about the fairness of the proceeding below." (Emphasis added)

We think the same can be said of the case at bar.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case should be remanded with instructions to dismiss the indictment. In the alternative, a new trial should be ordered.

Respectfully submitted,

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is hereby received this 15 day of Sept 1976

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